

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants:	Bryan, <i>et al.</i>	
Serial No.:	10/594,064 - Case No.: 21571P	Art Unit: 1656
Filed:	September 25, 2006	Examiner: K.H. Gebreyesus
For:	OPTIMIZED EXPRESSION OF HPV 52 L1 IN YEAST	

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Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 C.F.R. §1.705(b)

Sir:

This is a request for reconsideration of the patent term adjustment (PTA) indicated in the Notice of Allowance mailed July 20, 2009. This request is submitted with the payment of the issue fee. The patent that issues from the subject application is not subject to a terminal disclaimer.

The Commissioner is authorized to charge the fee set forth in 37 C.F.R. §1.18(e) to Deposit Account No. 13-2755. Please charge any fee deficiencies in connection with this request to Deposit Account No. 13-2755.

Applicants respectfully request that the PTA determination be corrected to include the days accrued pursuant to 37 C.F.R. § 1.702(b) "*Failure to issue a patent within three years of the actual filing date of the application.*" The Patent Office delay under 1.702(b) is occurring more than three years after the subject application was filed and does not overlap with the 499 days of Patent Office delay due under 37 C.F.R. § 1.702(a).

According to 37 C.F.R. § 1.702(a)(1), the term of an original patent shall be adjusted if the issuance of the patent was delayed due to the failure of the Office to mail at least one of a notification under 35 U.S.C. § 132 or a notice of allowance under 35 U.S.C. § 151 not later than fourteen months after the date on which the application fulfilled the requirements of 35 U.S.C. § 371 in an international application. The requirements under section 371 for this international application were fulfilled on September 25, 2006. The date fourteen months after the section 371 requirements were fulfilled is November 25, 2007. A Restriction Requirement was mailed on April 7, 2009, which constitutes 499 days of Patent Office delay under 37 C.F.R. § 1.703(a); i.e., the number of days from November 25, 2007 to April 7, 2009.

There were no circumstances constituting a failure to engage in reasonable efforts to conclude processing or examination of the application as set forth in 37 C.F.R. § 1.704. Accordingly, the PTA accrued under 37 C.F.R. § 1.702(a)(1) is PTO Delay – Applicant Delay = 499 – 0 = 499 days.

According to 37 C.F.R. § 1.702(b), the term of the original patent shall be adjusted if the issuance of the patent was delayed due to the failure of the Office to issue a patent within three years after the date on which the national stage commenced under 35 U.S.C. § 371. The date three years after commencement of the national stage is September 25, 2009. According to 37 C.F.R. § 1.703(b), the number of days accrued to date under Rule 1.702(b) is 24 days; i.e., the number of days from September 25, 2009 to October 19, 2009. The final determination cannot be made until the patent is granted.

There has been no delay due to Applicants during the 1.703(b) period. Accordingly, as of today Applicants are entitled to $499 + 24 = 523$ days of PTA. This PTA is subject to further adjustment taking into account the actual grant date of the patent.

The PTA determination of the Patent Office (copy attached hereto as Exhibit A) lists 499 days of Patent Office delay and 0 days of Applicants delay. The Patent Office PTA determination does not include the delay due to the failure to issue the patent within three years of the commencement of national stage. Applicants respectfully submit that under *Wyeth v. Dudas*, Civil Action No. 07-1492 (JR), 580 FSupp2d 138 (DC, September 30, 2008) ("Wyeth"; copy attached hereto as Exhibit B), the delay under 37 C.F.R. §§ 1.702(a)(1) and 1.702(b) should be added together. *Wyeth* presents essentially the same factual situation as presented in the instant application. In *Wyeth*, the plaintiff argued that the time period due to actual Patent Office delay under § 1.702(a)(1) and the time period due to the failure of the Office to issue a patent within 3 years of the filing date under § 1.702(b) does not overlap unless there is an actual overlap. The Court agreed, stating that, for purposes of determining PTA, the "only way that periods of time can 'overlap' is if they occur on the same day." Applying *Wyeth* to the instant situation, there is no actual overlap between the 499 days of Patent Office delay and the 24 days (and counting) due to failure to issue a patent within three years. Accordingly, Applicants respectfully submit that the proper PTA is the sum of the days arising from the two sources of delay.

Accordingly, it is requested that the PTA determination for this application be changed to add the delay due to the Patent Office failure to issue a patent within three years to the earlier accrued 499 days of PTA.

Respectfully submitted,

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